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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JAMES PELFREY, Defendant and Appellant.	A125780 (Mendocino County Super. Ct. No. SCUKCRCR09-90317)
In re ANTHONY JAMES PELFREY, on Habeas Corpus.	A129364

I. INTRODUCTION

Anthony James Pelfrey entered dual pleas of not guilty, and not guilty by reason of insanity (NGI), to four related felony counts. In a bifurcated court trial, he was acquitted of one count but found guilty of attempted murder of Aurelio Ortiz with use of a deadly weapon (knife) and infliction of great bodily injury (GBI) (count 1; Pen. Code, §§ 187/664, 12022.7, subd. (a), 12022, subd. (b)(1)),[1] assault on Ortiz with a deadly weapon (knife) plus infliction of GBI (count 2; §§ 245, subd. (a)(1), 12022.7, subd. (a)), and assault on Noel Murray with a deadly weapon (knife) plus infliction of GBI (count 3; §§ 245, subd. (a)(1), 12022.7, subd. (a).)

In the sanity phase of trial, the court found, under section 25.5, that defendant was not legally insane because his mental problems were the result of long-term drug abuse.

[1] All unspecified further section references are to the Penal Code.

Sentenced to an aggregate unstayed prison term of 13 years, defendant appeals challenging the sanity finding and sentence calculation. We uphold the sanity ruling but amend the sentence.

We also summarily deny a related petition by defendant for writ of habeas corpus (A129364) that we ordered considered with the appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

When a defendant pleads not guilty and NGI, trial proceeds first on the not guilty plea, with the defendant conclusively presumed sane at the time of the charged offenses. (*People v. Hernandez* (2000) 22 Cal.4th 512, 520.) If guilt is found, trial continues on the NGI plea, with commission of the acts conceded and the sole issue being whether the defendant was sane and thus subject to punishment, the burden being on him to prove by a preponderance of the evidence that, at the time of the offense, he was incapable of knowing or understand the nature of his act or of distinguishing right from wrong. (*Id.* at pp. 520-521.) In these distinct phases of what is essentially the same trial (*id.* at p. 521), "the evidence as to each may be overlapping," particularly guilt-phase evidence about the defendant's state of mind (*id.* at p. 520). Thus, while defendant's only trial claim goes to the sanity phase, we summarize both phases, to capture overlap from the guilt phase.

A. *Guilt Phase*

The crimes were seemingly unprovoked knife attacks by defendant on Murray and Ortiz on July 25, 2007, at property of nonagenarian Henry (Hank) Erickson at 60 Kunzler Ranch Road in Ukiah, Mendocino County. It was a compound where residents interacted daily, somewhat like a family. Erickson lived in the main house, with people assisting him, and he rented out other buildings. Longtime residents Vernon Ketchum and Hayden McAfee lived in two of the cabins; 3-to-4-year resident defendant (called "T.J.") lived in another; and for the past year, Ortiz had operated an auto shop in a warehouse he rented a couple hundred yards behind defendant's cabin. Murray was homeless but camped out at some railroad tracks across a stream near the property.

Eyewitness testimony came from victims Murray and Ortiz, Ortiz's brother Jose Inez Ortiz Acosta (Acosta), McAfee, and defendant's girlfriend Katherine (Adrienne) Wilcox, who was at the cabin with him that day. Defendant did not testify.

Wilcox was defendant's girlfriend. She got along well with him. They had once sought restraining orders against each other but had not followed through. Defendant was occasionally jealous. That past summer, he told her he was jealous about her and Ortiz but, in fact, nothing had gone on between Ortiz and herself. The episode resolved when Wilcox agreed not to go near Ortiz's shop. On the day of the attacks, Wilcox was with defendant in his cabin, watching TV. She said she did not drink alcohol or use drugs that day, and never saw defendant using narcotics in her presence. Defendant owned a hunting knife, over a foot long, that he carried around in a sheath, but Wilcox did not recall seeing him with it that night. Defendant's white Ford pickup truck was parked on the property, some distance from the cabin. Around 10:30 p.m., Wilcox recalled staying on a bed watching TV while defendant left the cabin while using her cell phone to talk with his brother.

Testimony about times was not precise, but the first victim was evidently Murray. Murray had known defendant about a year, had met him 12 to 15 times, had been in his cabin, and felt he had a very good relationship with him. Defendant never threatened him, and they would greet one other upon meeting. Murray also knew others at the property, including Ortiz, and he felt welcome there.

Around 11:30 p.m. that night, Murray crossed the creek and came up to get a drink from a water hose outside Ortiz's shop. In a dark area on the way back, he saw defendant (recognizing him by size and stature) walking his way. He called out, " 'Hey, how you doing, T.J.?' " but defendant did not answer. This was odd and put Murray "on guard." It was too dark to see well, but defendant kept coming. Murray stopped, and the next thing he knew, was struck on the head. He recalled one blow at trial, but had told a deputy sheriff that night he was struck twice. He could not really see defendant swing anything at him but told the deputy it might have been a machete-type weapon. He recalled raising his left arm to shield his head and his arm being struck. Scared and

stunned, Murray ran out to State Street, along one side of the property, yelling: " 'Oh, fuck. What the hell just happened? What the hell did you do that to me for?' " Defendant remained silent.

The attack left Murray with cuts on his cheek and nose, and flesh gouged out of his left forearm. He retreated for awhile, to gain composure, decide what to do, and how to safely circle back to the property to get medical help.

Meanwhile, sometime after 11:00 p.m., Ortiz was out in his shop with his brother and two people who had come to pick up a car. Ortiz recalled an incident months earlier in which he and defendant had a sudden physical confrontation, but that had nothing to do with Wilcox. Defendant had been "upset with everyone then." He and defendant had a good current relationship and were very friendly. He had been over to defendant's cabin, and they had plans to go to Mexico. Earlier that day, Ortiz had seen defendant at the main house, and heard that defendant had said, " 'I'm going to kill them before they kill me.' " Ortiz did not take that as a personal threat, however; in fact, defendant warned him "that there were people who wanted to harm us." Ortiz had no reason to think that defendant would harm him.

As Ortiz knelt by a car sanding it, defendant entered the shop, walked straight toward him with a machete and, without saying anything, struck him hard with it. Two blows connected before Ortiz's brother intervened with a lamp to ward off the blows. Ortiz was able to evade more blows, but the first one opened a seven-inch cut on his face, and the second hit him in the wrist, leaving him with no feeling in that hand. He was sure that, without Acosta's help, he would have been decapitated. Acosta escaped injury, although defendant swung the machete at him, too. Defendant ceased his attack suddenly and walked out of the shop, toward his cabin, still having said nothing. Ortiz bled profusely and was convinced he would die. He left the shop, ranting and wanting to do harm to defendant. He yelled, "We are going to finish this," but only managed to throw a stick. Wilcox came out of the cabin and kept herself between the men. Then she and defendant went into the cabin.

Wilcox had been roused by defendant appearing at the doorway and then screams from a woman at the shop. Defendant had a terrified look, held the hunting knife in one hand, and said something like: " 'Better leave. The cops will be coming. Something bad happened.' " Hearing the woman scream, Wilcox pushed past him, went out to a parking area near a pump house under a light, and pushed defendant back to keep herself between him and the bloodied Ortiz, who was threatening to kill him. Ortiz would lunge at defendant, and defendant assumed a fighting stance behind her. The screaming woman was clad in bra and underwear. There were two other men, including Murray, whom she knew but did not initially realize was injured. She did not know Acosta at all. She yelled for her cell phone, which was found and returned to her, and at some point saw the other woman calling for help on a cell phone. Wilcox also banged on the door of the main house, and tried to summon McAfee.

Frightened after a few minutes of the commotion outside, Wilcox led defendant back to the cabin. He asked her to leave with him, but she refused and told him over and over, "Just go." She followed him to his truck where she demanded, "What did you do?" but defendant had a blank, gazed look and only asked her again to go with him. She said no, and added, as he got into the truck, " 'Don't die on me,' " meaning "don't do anything bad to yourself . . . ." He drove off, and that was the last she saw of him then. She left also, apparently before medical help arrived. She got a ride to a pay phone at a gas station, where she had a friend pick her up.[2]

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[2] That she needed a pay phone to call a friend renders suspect her testimony that she got her cell phone back before leaving. A reason to reject it outright is testimony by Deputy Timothy Goss that he returned the phone to her after finding it on a bench in the shop office, where Acosta had left it, after Acosta had found it on the ground. Wilcox's testimony was that she never went to the shop.

Further inconsistencies also cast doubt on her candor, and she conceded that she still cared "[v]ery much" for defendant. She testified that she did not see defendant with the knife anytime that day before the attack and that his relationship with Ortiz was good. But Acosta testified that she and defendant were out walking together that afternoon, as defendant took the knife in and out of its sheath, and Wilcox had told Deputy Goss the day after the incident that defendant "hated" Ortiz. She did not remember telling Goss

Murray, meanwhile, had circled back up to the shop, advised by another homeless man that he ought to get stitches. He arrived at the shop to find the roll-up door open and Ortiz and Acosta at it, apparently waiting for medical help. Murray stayed outside, and Ortiz paced, holding his bloodied face in this hands.

When paramedics arrived, Murray was taken by ambulance to a hospital and treated that night, receiving sutures on his nose, cheek and hand. Nearly two years later, at trial, he had scars on his face, arm and hand, and had not followed through to obtain a recommended skin graft for his arm. Ortiz, more seriously hurt, was treated first at a hospital in Ukiah and then flown by helicopter to one in Sacramento for a few days. At trial, he was still being treated for his injuries, had residual numbness in his hand and, from the trauma to his head, dizziness, forgetfulness, serious memory trouble, and an incomplete memory of what had happened that night.

His brother, Acosta,[3] added background and detail, saying he recalled the incident like "it was yesterday." Acosta was not a resident but had come from Las Vegas a few days earlier to work with Ortiz in the shop. Soon after Acosta arrived, defendant came into the shop for tools and asked what he was doing there. Acosta said: " 'Well, I'm working here. I'm Aurelio's brother.' " Defendant then "made this movement with his hand. I think it was a threat, but I didn't give it that much importance." Acosta did not know defendant and "thought maybe he was joking or something." Defendant came in twice more after that, and Acosta sensed no problems. Then, around 3:00 p.m. on the afternoon before the attacks, Acosta was working on a car outside the shop when he saw

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that she told defendant to put the knife away, but "could have," since he asked her to identify the knife sheath, which had been found in the shop office.

Given her demonstrated propensity to put defendant in the best light, at the expense of facts, one could question her testimony about defendant not using drugs or alcohol on the day of the attacks. Indeed, her testimony was only that she did not "see" him use any sort of narcotics "in her presence." Nothing in the court's ruling sheds light on how the court viewed that part of her testimony.

[3] While in testimony Acosta gave his preferred surname as Ortiz, other witnesses referred to him as Inez or Acosta. We use the last of his revealed surnames, Acosta (Jose Inez Ortiz Acosta), to avoid confusing him with his brother.

defendant and a "woman he was with" (presumably Wilcox) walking together. Defendant had a knife and "was, like, playing with it, putting it in and out of the sheath," looking over at the shop.

Acosta was first aware of the attack when, while in an office at the front of the shop, he saw Ortiz running to the office door, with defendant in pursuit swinging a big knife that hit the door with one blow. Ortiz was already hurt, although Acosta was not immediately aware of it, and the brothers took refuge in the office. Defendant came at them both, but they were able to keep a television set situated between themselves and him, so that he had to strike at them over the television. Acosta grabbed a big lamp and raised it to help ward off the knife blows, managing to keep defendant from landing any. The attack lasted about 15 minutes; then defendant turned and ran out of the shop, never having said a word.[4] Ortiz followed after defendant, despite Acosta's efforts to hold him back, and Acosta observed his brother arguing with defendant and defendant's girlfriend telling them to calm down. Acosta saw the gravity of the injuries when Ortiz came back bleeding heavily and holding a hand over a long cut on his head. A man who owned one of the cars was there in the shop with a woman. The man had watched the attack from the open doorway, but the woman had run outside. Acosta asked the man to phone for help, but he refused to get involved, and soon left. Acosta turned to a second woman, who had been asleep in a trailer (evidently the woman seen in bra and underwear), and she did phone for help.

Acosta saw a second injured man arrive, with cuts to his hand and nose, just after "doctors" arrived. And while the timing is unclear, Acosta also testified that he heard "this man"—meaning defendant—say to Ortiz, " 'Now you are bleeding like a pig.' " Acosta thought the police found the knife sheath.

McAfee evidently did not witness the events that night but told of a scuffle between defendant and Ortiz nine months earlier that had been resolved. He said he had

[4] Combining Ortiz's 15-minute estimate with whatever time it took for the assault on Murray undermines Wilcox's repeated testimony that defendant was gone from the cabin about five minutes.

daily contact with both men, would have known of any simmering problems between them, and knew of none. Defendant was shocked that it happened, and Ortiz, "equally as shocked," remarked: " 'T.J.'s my friend. What was this about?' "

Sheriffs found defendant's truck the next morning at a boat ramp on Lake Mendocino, and Deputy Raymond Hendry found defendant sitting on a nearby bench, between 7:00 and 8:00 a.m., and spoke with him. Defendant wore a beanie and, underneath it, a sheet of tin foil. He told Hendry something like, "I knew you would find me." When defendant stood up without honoring a request to show his hands, Hendry forced him to the ground, handcuffed him, and searched him and a jacket. Finding no weapon, he asked where the knife was, and defendant said it was in the lake. Defendant said he had gone out on a drift log, dived under the water and stuck it in the dirt on the lake bottom. The deputy figured this would have been 20 to 25 feet offshore but was unable to locate the knife.

It was stipulated that an analysis of blood drawn from defendant on the day he was apprehended revealed the presence of marijuana.

B. *Sanity Phase*

The court heard from psychiatrist Donald Apostle and clinical psychologist John Podboy, each called by the defense, and forensic psychologist Tom Cushing, called by the prosecution. Each of them had examined defendant, and their expert qualifications were stipulated. Preliminarily, reading specialist Katherine McCarthy, who worked with high school students, testified that she gave defendant a commonly used reading assessment test that showed him able to read without difficulty, if assisted, at a second grade level and likewise able to read at levels between third and fifth grade. With eighth-grade-level material, however, he had only 50 percent comprehension, and was at his "frustration level."

Donald Apostle. Apostle found defendant to have a flat affect and little range of emotion, but able to give "a fairly good history" of what went on at the time of the offenses. Working also from competency reports by Dr. Rosoff and Kevin Kelly, prepared at Napa State Hospital (Napa), where defendant spent about seven months to

gain trial competency (§ 1368), Apostle found defendant to be of average intelligence but with a very marginal educational level or capacity to develop his thoughts. He seemed to have gained insight about what he had done during his time at Napa, reporting that it took him a long time there "to realize how crazy he was." He had been diagnosed there as having methamphetamine-induced psychotic delusional disorder "of long-standing duration" that was in remission in the institutional setting. He surely had acute symptoms when admitted. He took Celexa and Trazodone, drugs that probably enhanced, rather than interfered with, his cognitive functions, and he responded appropriately. Apostle did not see it himself, but defendant reported having intermittent auditory hallucinations.

Defendant reported his own background, but Apostle also had written statements from family members. He concluded that defendant had led a tragic life, exposed at an early age to cooking, making, smoking and using methamphetamine, physical and sexual abuse, little guidance, no boundaries, and 23 years of methamphetamine abuse. Vague reports were that, at the time of the attacks, defendant had been off methamphetamine for perhaps two weeks, which would cause depression, and had been ingesting Jimsonweed (datura stramonium) from the yard as a way of dealing with the withdrawal, perhaps contributing to further toxic delirium and psychosis. The blood draw had shown just marijuana, but it would have been hard to test for Jimsonweed. Methamphetamine and hallucinogens such as LSD and ecstasy, all of which he had taken, produce neuronal death—the death of brain cells—causing "significant problems with his brain anatomy." He had also abused prescription medications, marijuana and alcohol, over time creating cognitive dysfunction and impaired ability to maintain boundaries and appropriate personal interactions, even without the drugs.

Apostle believed that defendant was "incredibly psychotic for weeks" at the time of the attacks, suffering a panoply of "incredible delusions, hallucinations and thought insertion, bizarre delusional beliefs, ideas of reference." Even at the time of striking the victims, "he was on the phone with his family in Minnesota thinking that they were even being attacked." He thought he heard messages from radio stations and background noises, and that people were having objects inserted up their rectums. He wore tin foil

over his head to protect himself from some kind of rays and bombardment, thought he had ESP, and was hiding under mattresses (even after his arrest) to protect himself from other kinds of rays and gunshots. He projected fears and paranoia onto his environment and attacked people that night. In fact, he had attacked someone six days before then, "thinking he was God and that they were somehow influencing a neighbor of his. It was only when the woman finally screamed and said, 'What are you doing' that he sort of came to his senses and he began to bow down and apologize and claim[] he was a schizophrenic." He was "very ill"—"one of the most sickest people" (*sic*) Apostle had heard of in a long time, and Apostle had 34 years of experience in making these evaluations. Friends and acquaintances wrote of defendant being paranoid and delusional for years, and "totally unpredictable in [his] ability to be in touch with reality. Sometimes he looked okay[,] and other times he was just sort of just totally out of it. So this was going on for years." Defendant believed that Ortiz had put sugar in his gas tank and felt jealous about him and Wilcox. Wilcox had testified that he was just watching TV before the attack: "[B]ut he was also hearing voices. He was listening to clicks and sounds from the TV announcers getting ideas of reference. There were . . . very poor boundaries between h[im] and the TV set. So I think her . . . interpretation of it I have no quibble with. But on the other hand, if you were able [to] sit down with him at that time and somehow could have done an examination about what on earth he was watching and what he was receiving on that television set, I think he was quite psychotic."

Apostle ultimately diagnosed a fixed severe psychotic delusional disorder (in Axis I terms, amphetamine-induced psychotic disorder with delusions). He did not consider defendant schizophrenic; any schizoid features were "way down the list in terms of their importance." He stressed repeatedly the cause being long-term drug use. It was: "consistent with long-term abuse of the methamphetamine," a result of long-term use of methamphetamine "and other drugs," a drug-induced psychosis, impaired mentation of "probably some organic brain syndrome secondary to all of this drug abuse over the years as well," with "paranoia" and "delusional ideation" lasting "even when the methamphetamine is no longer in the system." One exchange, on being asked whether

the paranoia was attributable to metham-phetamine abuse, was: "A. I think so. [¶] Q. As opposed to another mental defect or disorder? [¶] A. Well, you know, the other drugs that are thrown in there and, you know, these things reinforce." Defendant was "acutely and chronically psychotic, paranoid secondary to chronic drug ingestions," and asked again whether it was a drug-induced psychosis, he elaborated: "I think so over the long run. But I think it turned out to have a life of its own over time. I think . . . he just became more of a psychotic, almost delusional person." He could appear directed and lucid, "But I wish I had a way of somehow sitting inside his brain at those moments because I think he's crazy most of the time." Apostle's DSM diagnosis was " 'Amphetamine-induced psychotic disorder with delusion,' " but "I think he also has hallucinations and—and brain damage and—on a chronic basis, yes."

Defendant was, in Apostle's view, insane under the M'Naughton test. "Certainly he had some knowledge that he [held a machete and] was attacking people, but this was based on faulty assumptions, psychotic assumptions and in a messed-up, severely psychotic state. I don't think he had any idea about the rightfulness or wrongfulness of his act." Much in the facts did show knowledge of right and wrong —telling Wilcox he had done something terrible, telling her the police were coming and that she should leave, taking the knife with him in the truck, disposing of it in the lake, staying away, and telling a deputy that he knew they would find him. In Apostle's view, however, this was a sudden and partial realization, much as in the assault six days earlier, where he seemed to come to his senses in the middle of psychotic behavior, and did not mean that he understood the wrongfulness of his earlier acts. Defendant "was psychotic all along. I think he was psychotic in terms of his delusional belief system and what was going on and he went to get this machete and he was going to take care of business because he thought his friends were being harmed and all this other stuff was going on in his head that was a misperception of reality. I think the—the awareness of what he finally did had some impact on him, to be sure. I think he did want to then go take care of that weapon and maybe even take care of himself." "Somehow he was able to . . . pull himself together afterwards and say, 'Oh, my God, I've done something wrong.' In fact, when he

went off to the lake . . . , he was going to go kill himself." Another explanation was this: "This is not like a light switch that goes off and on. This is not like somehow he's lucid and then he's in the dark again. I think it's really a baseline, very, very marginal. And there are time's when . . . reality raises his head and he says, "Oh, my God, I really blew it this time.' And then he—but he can't. He can't keep that up. I mean, he's just too disturbed."

John Podboy. Defendant's second expert held similar views. Podboy had given defendant no reading or psychological test tests but had interviewed him for a couple of hours and, based as well on materials from Napa, interviews with acquaintances, and reports by Apostle and Cushing, agreed "for the most part" with the Napa diagnosis of amphetamine-induced psychotic disorder with delusions, polysubstance dependence and institutional remission. Podboy only questioned whether one could be truly in remission at Napa given possible availability of drugs there.

Podboy held a less sanguine view than Apostle of defendant's intelligence. He saw "subnormal" intelligence and "very abnormal," "truncated" affect. Defendant, he said, did not know his height, weight or age. He deemed him an "impaired historian" yet, like Apostle, credited defendant's accounts of personal history. Since he thought defendant might read at a second to fourth grade level but was "essentially illiterate" (believing he completed only the first grade), he deemed use of the Minnesota Multiphasic Personality Inventory (MMPI) test (with an eighth-grade protocol) inappropriate and would "totally discount" its results. He deemed defendant "untestable," generally, because he was "absolutely brain damaged" (neuropsychologically damaged).

Podboy, like Apostle, found the cause of that damage to be long-term abuse of drugs, particularly methamphetamine, and he stressed that it was permanent, untreatable damage. "[H]e was a chronic drug abuser. I felt that he was someone who was deficient both in his cognition and also in terms of his affect. I felt that he was so seriously brain damaged that his condition is irreversible. There's nothing that can be done about it. There's no medication and there's no treatment. And when I saw him, he was taking an

antipsychotic medication and an antidepressant medication. But nonetheless, he was obviously psychotic. He told me about responding to internal stimuli, hallucinations and how he would chant to deal with them, his coping mechanism that he developed, and he . . . was doing that in custody he told me." "And I'm not trying to fault Napa State Hospital or anybody else," he explained, "He's done this to himself." Defendant had abused drugs "for many, many years. . . . And he deteriorated over time to the point where he became not only detached or disconnected from reality[,] where he was psychotic, but he was also delusional about many different things. It was a paranoid type of delusion. I think he wore a tin foil cap or something shaped into a cap over his head to keep some sort of electrical rays from bombarding his central nervous system. [¶] He referred to some Nazi machine that made your head larger or your brain larger. He was someone who began to speak of himself in the third person at times, stating to me, 'I don't know how he could have done that' or 'Wasn't he crazy then,' that sort of thing. [¶] He had some concerns about friends and neighbors who were going to do bad things to him. Here it is. There was a Nazi machine to make your head bigger, and apparently at some point he was . . . trying to find this machine. But I—in my opinion, I felt that he was totally psychotic at or about the time of these allegations." He had been psychotic for years, was psychotic "today as we sit here in this courtroom," and this was not "changeable." He had "damaged himself irretrievably due to decades of methamphetamine abuse, and in so doing, developed a delusional disorder from which" he had not recovered. He was "one of the most disturbed people I have seen in my career." Podboy spoke of a long-standing underlying mental disorder, but did not believe there was another mental disorder or defect "other than amphetamine induced psychotic disorder."

Nevertheless, one can function in a psychotic state and not appear deranged. Thus, he was able to drive a car and take care of his daily needs. Defendant was insane as he committed the acts, Podboy opined.

Podboy ultimately concluded that defendant did not understand "the nature and quality of his acts" at the time of the assaults, one component of the M'Naughton test of

insanity as long used in California (*People v. Kelly* (1973) 10 Cal.3d 565, 574 (*Kelly*)). We see nowhere in his testimony, however, where Podboy rendered a direct *opinion* on whether defendant appreciated, at the time of his acts, their rightfulness or wrongfulness, the other component of the test (*ibid*.). This left the court without any direct testimony by him on the knowledge-of-wrongfulness component, something the court did not mention in its ultimate sanity ruling. The court, however, could have drawn inferences from one place in the transcript where Podboy responded, when asked whether defendant's acts of telling Wilcox the police were coming and then getting rid of the weapon showed psychosis, acts Podboy had just conceded were *not* inherently consistent with psychotic behavior. Podboy replied: "Yes, because another part of that, a parallel process is that he was convinced [of] the rightfulness of what he did. Certainly it was legally wrong and morally wrong, but his own internal values and perspective on the world and his life justified everything that he did."

Podboy conceded that many of defendant's acts did not intrinsically indicate psychosis, and could normally indicate guilty knowledge or knowing what he had done—like telling Wilcox he had done something wrong and that the police were coming, telling law enforcement the next day he knew they were coming, writing a letter to Ortiz asking him not to testify so he would not have to go to prison, and disposing of the weapon in the lake. Podboy's most direct answer came when asked if this meant he thought defendant was passing in and out of psychosis: "No," he said: "I think he was psychotic throughout that period of time. And I appreciate the precision of . . . your questioning. But as I testified to earlier, I think the backdrop to all of this was the fact that we had at that time a brain damaged individual who had been psychotic for a long time, for years, and concurrently was also delusional. And there were behaviors that he engaged in, as you pointed out, that any one of us might have engaged in if we were so prone to criminal misconduct. [¶] But I think when we take all . . . that I've been able to pull together about this individual, there is an unmistakable psychotic trajectory to what he did [from start to finish]."

Tom Cushing. Cushing used much the same source material and interviewed defendant for more than five hours over three sessions, the first session using 90 minutes of two-plus-hours administering an MMPI test. Most of defense counsel's extensive cross-examination consisted of questioning the administration and ethical propriety of using the MMPI test on defendant, given his intelligence and reading abilities. Cushing, however, said he used the test "routinely" in making forensic assessments of this type (citing §§ 1026, 1027, subd. (b)), which he had been doing for 32 years. He also had more positive assessments of defendant's affect and reading ability than his fellow experts. He found defendant to be very cooperative, sequential in delivering information, off by just a year in giving his age as 30 (it being 31), able to give the dates he spent at Napa, appropriately interactive, not preoccupied, having a flat and somewhat depressed (but not blunted) affect, and very appropriately engaged, making eye contact over 50 percent of the time. Defendant told him he had been in special education classes and dropped out of school halfway through the ninth grade, but later acquired his high school equivalency certificate (GED) through the California Conservation Corps. He had also been able to pass tests for his driver's and commercial driver's licenses. Defendant reported no hallucinations during the sessions and exhibited no such behavior. Cushing felt (without formal testing) that defendant manifested gross normal (i.e., low average to average) intelligence. Cushing acknowledged defendant's early sexual abuse and "sad" dysfunctional family upbringing, plus long use of methamphetamine, plus LSD, ecstasy and marijuana. There was no notable abuse of alcohol, or any history of prior psychiatric hospitalization.

The MMPI, Cushing explained, is a standardized personality instrument used to assess present level of psychological function as reported by the individual, and it played no part in his ultimate assessment of defendant's sanity at the time of the offenses. The test has to do with helping relate to the court that part of section 1027, subdivision (b), that focuses on how the person is "functioning now, not anything to do with his mental state at the time of the offense."

The MMPI consists of 567 short statements that the person usually reads to himself and marks as true or false. Results are scored via authorized software. Cushing first conducted a 45-minute oral interview with defendant. Then, as is his custom where there is doubt about reading ability, Cushing began by having defendant read the first 10 statements aloud, to test reading skills. This took defendant two minutes, during which he gave his responses orally as well. When Cushing determined from his training and experience with hundreds of examinees that defendant had difficulty reading but was better in verbal comprehension, he continued by reading the statements aloud and writing down defendant's oral answers. The full test took 90 minutes, the same time as a person with an eighth-grade education. The statements have some words that may be unfamiliar, in his experience, even to readers beyond eighth grade level, like the word "brood" in "I brood a lot." Cushing read just the statements but, if asked the meaning of a particular word, explained concisely. If defendant said he did not know a word, Cushing gave a brief definition, nothing more; if the questions went further, Cushing just directed, "Do the best you can." Defendant asked questions on 15 to 20 of the 567 statements.

Challenged by defense counsel that reading statements to defendant and giving him definitions were not mentioned in written protocols for the test, Cushing explained that he had heard the test authors, at an advanced seminar, specifically approve giving brief definitions. The authors also sold audio tapes, in various languages, to play in lieu of examinees doing the reading. Cushing had those tapes in English and Spanish but, lacking a tape recorder that day, had read them rather than use a tape. He did not believe this was "out of protocol."

MMPI results do not give diagnoses but, rather, data about consistencies with persons having particular diagnoses. The results here showed responses consistent with someone experiencing considerable anxiety, tension and depression, i.e., diagnoses of anxiety disorder, dysthymic disorder, or schizoid personality disorder. The responses reflected acknowledgement of ongoing drug problems, but also unusual and somewhat bizarre ideas—responses not similar to a psychotic disorder, but consistent with reported behaviors and conduct while defendant was housed in the general population in county

jail. Jail staff had reported to Cushing that defendant was not demonstrating behavioral problems, was completely appropriate for the general population, was not in seclusion or restraints, and was not a problem inmate. Those experiencing methamphetamine-induced psychotic disorder with delusions—Cushing's ultimate conclusion for defendant at the time of the offenses—are commonly very disruptive in a jail setting, both with other inmates and staff. In Cushing's view, defendant had improved but was "not fully recovered" and, while he no longer showed "overt signs or symptoms" of a psychotic disorder, still exhibited some unusual or bizarre ideas.

Cushing also assessed defendant on a global assessment scale (GAF), giving him scores of 35 at the time of the assaults and 60 when he interviewed him. These reflected a scale of 1 to 100, with 1 being the absolute worst and 100 the ideal best. The 35 score indicated some psychotic presentation plus partial impairment of reality.

Cushing concluded that defendant suffered at the time of the attacks from the mental disease/disorder of substance-induced psychotic disorder (primarily methamphetamine) with delusions, polysubstance dependence, now in institutional remission. Secondarily, he felt the symptoms were the result of ongoing ingestion and then withdrawal from methamphetamine coupled with Datura ingestion, which can cause hallucinations and delusions. *Withdrawal* referred to defendant having ceased using methamphetamine shortly before the attacks, and *Datura* referred to reports that defendant was eating the plant's flower (that very day, he told Cushing). Withdrawal does not stop the symptoms of long-term methamphetamine abuse; it may even enhance them. The blood test did not show use of Jimsonweed, but the test did not address that issue. Further report language that the disorder was "the result of self-ingestion and not the result of long-standing underlying mental disorder, per se," was ill-phrased but meant that there was no "other underlying mental disorder along with the substance-induced psychotic disorder." His opinion roughly coincided with the conclusions of the other

experts, and was consistent with language in the Napa reports (which dealt with the different issue of competence to stand trial).[5]

In spite of that mental disease/disorder, Cushing concluded that defendant did understand the nature and quality of his act, meaning he had a basic understanding of where he was, what was going on and what he was doing. This was shown by his ability to "describe what he did with the knife before, during and after the offense." Only a "very, very rare" individual would lack such awareness. Defendant was aware that, "by swinging a knife at someone, it could cause harm"; he held no illusion that the knife was, say, "a magic wand" that would transport the victim "to some wonderful state . . . ."

On the alternative M'Naughton question of whether the mental disease or disorder rendered defendant unable to appreciate the moral or legal wrongfulness of his actions, Cushing expressed no opinion in his report. He did not reach the question because he understood, under California law, that if, as he concluded, the disease/defect was caused by abuse or addiction to drugs, the effect was irrelevant because the condition itself did not qualify for insanity. Nevertheless, offering an opinion for the first time in testimony, Cushing felt that, in spite of his condition, defendant "did know and understand that his act was morally or legally wrong." His statements, conduct and behavior during and immediately following the offense were not consistent with someone who was psychotic.

Argument. Before hearing final arguments, the court asked the parties to come prepared to specifically address the issue, highlighted in Cushing's testimony of whether current law removed from legal insanity a mental disease or defect caused solely by use of or addiction to drugs. The parties did so, arguing that issue at length before the court ruled.

Ruling. The court referenced standard jury instruction CALCRIM No. 3450 in ruling: "The two issues that need to be addressed are defined as follows: One, when he committed the crime or crimes, he had a mental disease or defect. And two, because of

[5] Cushing felt there was a very good chance that defendant also suffered from posttraumatic stress disorder (PTSD), but he did not deem that a primary diagnosis.

that disease or defect, he did not know or understand the nature and quality of his act or did not know or understand that his act was morally or legally wrong. [¶] I tend to agree that the experts who testified certainly all seemed to conclude that because of a disease or defect he didn't know or understand the nature or quality of his act or did not know or understand that his act was morally or legally wrong."

The "real issue" before it, the court stated, was the mental-disease-or-defect prong as limited by bracketed language in the instruction for conditions caused solely by abuse of or addiction to drugs or alcohol, or organic brain damage or settled mental disease lasting after the immediate effects of such intoxicants have worn off (language quoted in fn. 6, *post*). The court said: "[I]t is often the case . . . that hearing cases such as this, your heart may go one way and the law may go another. And in this particular case, it has been suggested by apparently the self-reporting of the defendant to various experts that his addiction started at a fairly early age and was to some extent the result of conduct by his parents. I'm not convinced based on the self-reporting in and of itself that that is of sufficient strength to conclude that his long-term use of amphetamine and his addiction is necessarily involuntary. [¶] The other point that has struck the Court is that . . . the Court has found and it was stipulated by the parties that [the three experts are] qualified. And I've heard many of these experts before, and I frankly know them to be qualified and we obviously to some extent have a differing point of view that the experts have offered. But the common theme that appears to have run throughout all the opinions is that the defendant's mental disease or defect was described as an amphetamine-induced psychosis. [¶] Now, I don't recall any of the doctors proffering another Axis I diagnosis or any other mental disease or defect that combined with that to explain their conclusion that he was legally insane. And obviously, there's a substantial difference between someone who's medically insane and someone who's legally insane."

The court concluded: "This is one of those cases where my heart is telling me one thing, but the law is directing me to conclude that the defense has not met their burden of proof that the defendant was legally insane at the time—and I emphasize that, legally insane at the time of this offense, and that's the Court's conclusion."

III. DISCUSSION

A. *Insanity Ruling*

Enacted in 1994, section 25.5 states: "In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense *shall not be found by the trier of fact solely on the basis of* a personality or adjustment disorder, a seizure disorder, or *an addiction to, or abuse of, intoxicating substances*. . . ." (Italics added.) The genesis of the provision was summarized by the Fifth District in *People v. Robinson* (1999) 72 Cal.App.4th 421 (*Robinson*), where the court construed the provision, which had been enacted following one of its own precedents.

"In 1993, this court published *People v. Randolph* (1993) 20 Cal.App.4th 1836, which held that refusal of CALJIC No. 4.02 (legal definition of insanity) was proper because the record did not contain substantial evidence supporting the conclusion that defendant suffered from a mental defect which remained after the effects of his voluntary consumption of intoxicants had dissipated. We set forth the existing state of the law as it relates to substance abuse and insanity: 'In [*Kelly, supra,*] 10 Cal.3d [at pp.] 574-575 . . ., the Supreme Court, acknowledging that a person cannot be convicted for acts performed while insane, held that a person may be found legally insane because of long-term voluntary intoxication when the intoxication causes a mental disorder which remains after the effects of the intoxicant have worn off. While this mental disorder need not be permanent, it must be of a settled nature and must qualify under the M'Naughton test. One "does not lose the defense of insanity because [he or she] may also have been intoxicated at the time of the offense." ' (20 Cal.App.4th at p. 1841, fn. omitted.) Earlier, *People v. McCarthy* (1980) 110 Cal.App.3d 296 . . . had explained *Kelly*'s [citation] holding more colorfully. 'If an alcoholic wants to use his problem as an escape hatch, he must drink enough to develop a mental disorder that continues when he is stone sober even though the damage is not permanent in the sense it is beyond repair.' (110 Cal.App.3d at p. 299.)

"With the passage of section 25.5, the Legislature changed the rule set forth above. Section 25.5 provides that if an accused's insanity is caused *solely* by abuse of or

addiction to intoxicating substances, then the insanity defense is not available to him or her. This statute makes no exception for brain damage or mental disorders caused solely by one's voluntary substance abuse but which persists after the immediate effects of the intoxicant have dissipated. Rather, it erects an absolute bar prohibiting use of one's voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless whether the substances caused organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicant have worn off. In other words, if an alcoholic or drug addict attempts to use his problem as an escape hatch, he will find that section 25.5 has shut and bolted the opening.

"Although there was, until now, no case law interpreting section 25.5, the legislative history of this section supports this straightforward reading of the statute. This section was enacted in the wake of the three strikes law. The expressed purpose of the statute is to narrow the availability of the insanity defense. According to the sponsor, the number of individuals attempting to plead not guilty by reason of insanity is expected to increase in response to the three strikes law: individuals facing life imprisonment are likely to seek any path available to avoid life imprisonment. The statute's exclusionary provisions 'will prevent potential abuse of the plea and therefore, appropriately direct these individuals to the correctional system rather than state hospitals. This will allow state resources to be utilized for the purpose of servicing those individuals who would benefit most.' (Sen. Com. on Judiciary, analysis of Sen. Bill No. 40X (1993-1994 Reg. Sess.) as amended Apr. 18, 1994.) The reason to exclude substance abuse was explained as follows: 'Clinicians agree, that substance abuse, personality, and adjustment disorders are considered as a mental illness but, are not seen as a major mental disorder. There is a significant difference between an individual with a major mental disorder and a substance abuser. The individual with a major mental disorder does not choose the illness. However, difficult as it may be, a drug or alcohol abuser does have a choice. Typically, these individuals have the capacity to distinguish between right and wrong and should be held responsible for their crimes.' (Assem. Public Safety Com., Republican analysis of Sen. Bill No. 40X (1994) p. 17; see also Sen. Com. on Judiciary, analysis of Sen. Bill No.

40X, *supra*, p. 21.) The legislation takes the position 'that substance abuse and addiction is self-induced and does not, by itself, excuse criminal behavior.' (Assem. Public Safety Com., Republican analysis, *supra*, p. 27.) By enacting the statute, the Legislature expressed its intent that individuals rendered insane solely because of their substance abuse should be treated differently than those afflicted by mental illness through no conscious volitional choice on their part." (*Robinson*, *supra*, 72 Cal.App.4th at pp. 426-428.)

The defendant in *Robinson* argued that a special jury instruction based on section 25.5 was erroneously given in his sanity-phase trial. Because the appellate court found no substantial evidence that the defendant's mental damage or disorder was caused *solely* by long-term substance abuse, it found the instruction to be erroneous (*Robinson*, *supra*, 72 Cal.App.4th at pp. 423, 426, 428), but harmless in the circumstances (*id.* at p. 429).

The principles were again addressed in *People v. Cabonce* (2009) 169 Cal.App.4th 1421 (*Cabonce*), where the defendant argued that the court erroneously limited insanity by standard instructions referencing the limitation of section 25.5. *Cabonce* reasoned, building on *Robinson*: "This limitation has been interpreted to establish 'an absolute bar prohibiting use of one's voluntary ingestion of intoxicants as the *sole* basis for an insanity defense, regardless whether the substances cause organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicant have worn off.' [Citation.] Thus, there can be no insanity defense when the inability to tell right from wrong derived (1) solely from an addiction or abuse of intoxicating substances, *or* (2) from a mental defect or disorder that itself was caused solely by such addiction or abuse. [Fn. omitted.]

"CALJIC No. 4.00 informed the jury of the limitation set forth in section 25.5. In part, it provided that legal insanity arises only if a mental defect or disease caused the inability to tell right from wrong. Moreover, the last paragraph of the instruction emphasized that the mental disease or defect cannot be based solely on addiction or abuse of intoxicating substances. 'However, this defense of legal insanity does not apply when the *sole or only basis or causative factor* for the mental disease or mental defect is a

personality disorder, a seizure disorder or an addiction to, *or abuse of, intoxicating substances*.' (CALJIC No. 4.00, italics added.)

"CALJIC No. 4.02, with which the jury was instructed as well, also incorporates section 25.5 and emphasizes that the mental disease or defect cannot be caused solely by addiction or abuse. 'A person is legally insane if by reason of mental disease or mental defect, either temporary or permanent, caused *in part* by the long continued use of alcohol, drugs, [or] narcotics even after the effects of recent use of alcohol, drugs, or narcotics have worn off, he was incapable at the time of the commission of the crime of either [¶] [(1)] knowing the nature and quality of his act; or, [¶] [(2)] understanding the nature and quality of his act, or, [¶] [(3)] distinguishing right from wrong. [¶] However, this defense does not apply when the *sole or only basis or causative factor* for the mental disease or mental defect *is an addiction to, or an abuse of, intoxicating substances*. [¶] The defendant has the burden of proving legal insanity at the time of the commission of the crimes by a preponderance of the evidence.' (Italics added.)"[6] (*Cabonce*, *supra*, 169 Cal.App.4th at pp. 1433-1434.)

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[6] The limitations of section 25.5 are also embodied in a standard instruction, CALCRIM No. 3450 (2010 ed.), which provides in bracketed language: "[Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity. This is true even if the intoxicants cause organic brain damage or a settled mental disease or defect that lasts after the immediate effects of the intoxicants have worn off. Likewise, a temporary mental condition caused by the recent use of drugs or intoxicants is not legal insanity.] [¶] [If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, that settled mental disease or defect combined with another mental disease or defect may qualify as legal insanity. A *settled mental disease or defect* is one that remains after the effect of the drugs or intoxicants has worn off.]" (Italics in original.)

A use note to CALCRIM No. 3450 explains: "Give the bracketed paragraph that begins with 'Special rules apply' when the sole basis of insanity is the defendant's use of intoxicants. (Pen. Code, § 25.5; [*Robinson, supra,*] 72 Cal.App.4th [at p.] 427-428 . . . .) If the defendant's use of intoxicants is not the sole basis or causative factor of insanity, but rather one factor among others, give the bracketed paragraph that begins with 'If the defendant suffered from a settled mental.' (*Id.* at p. 430, fn. 5.)"

Defendant broadly attacks the *Robinson*/*Cabonce* construction of section 25.5. He does this by bringing to our attention the full analysis by the Senate Committee on the Judiciary only partially cited in *Robinson* (*Robinson*, *supra*, 72 Cal.App.4th at p. 427), and analyses for two bill readings and three hearings before the Assembly Committee on Public Safety. Each source contains virtually the same language, and none specifically mentions the legislation's effect on mental disease or defect caused by long-term drug abuse or addiction as specifically as the Republican analyses cited in *Robinson* (*id.* at pp. 427-428). Defendant's cited history speaks to existing law and limiting the NGI plea, in part, by specifying stated personality disorders, adjustment disorders, and drug use and addiction, as conditions removed from the legal definition of insanity.[7]

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[7] Representative are these Comments from an Analysis for the Assembly Committee on Public Safety of SB 40X, as amended May 10, 1994: "1) Purpose. According to the author:

"Current law, which was added by initiative, provides that a person who has entered a plea of [NGI] must prove, through [a] preponderance of evidence, that he or she was incapable of knowing or understanding the nature o[r] quality of his or her act and of distinguishing right from wrong at the time of committing the offense. For the purposes of insanity plea[s], this bill defines those mental conditions that would not be admissible when a plea of NGI is entered. The NGI defense shall not be solely based on personality disorder, adjustment disorder, or addiction to, or abuse of, intoxicating substances. The exclusion of these conditions will prevent potential abuse of the plea and therefore, appropriately direct these individuals to the correctional system rather than the state hospitals. This will allow state resources to be utilized for the purpose of servicing those individuals who would benefit the most.

"Clinicians agree, that individuals with a personality disorder do not have a major mental disorder. Typically, these individuals have the capacity to distinguish between right and wrong. Individuals with a personality disorder may use the NGI defense to avoid prison terms. Shortly after commitment to a state hospital (180 days) these individuals are eligible to apply for restoration of sanity and conditional release by the courts.

"Following enactment of [the] three strikes law, it is expected that the numbers of individuals attempting to use the NGI plea will increase. Individuals who find themselves subject to three strikes are likely to seek alternative paths to avoid life imprisonment.

In defendant's view, section 25.5 was only "intended to preclude the defense in cases in which the evidence showed only that current drug use had caused the defendant to have a mental state which otherwise met the M'Naughton standard, and there is no indication that is was intended to change the rule that the standard may be met where something more than current use is the cause—i.e., a settled condition brought about by long-term abuse."

"2) Personality and Adjustment Disorders: According to the Department of Mental Health:

"a) Major Mental Disorders. Major mental disorders are manifest by substantial disorganization of thinking, emotions, and/or perceptions of reality; they are illnesses which interfere with the capacity for normal work and social function. Examples are manic-depressive illness and schizophrenia. Persons subject to major mental disorders can be expected to benefit from mental health treatments, such as medications, therapy, and psychosocial support. These disorders are the traditional basis of a finding of not guilty by reason of insanity. This bill would not affect use of major mental disorders as the basis of an NGI finding.

"b) Personality Disorders: Persons with personality disorders are not out of touch with reality. Persons with these disorders have difficulty adjusting to societal constructs and are persons who are easily angered and have irresponsible behavior patterns. They are not particularly amenable to therapeutic support. These disorders could not be used as the sole basis of an NGI finding under this bill.

"c) Adjustment Disorders. Adjustment disorders are temporary, short-lived, uncharacteristic, dysfunctional reactions that may occur in response to a normal life situation. Persons with these disorders are not out of touch with reality. These disorders could not be used solely as a basis of an NGI finding under this bill.

"3) Limitation of Definition of Insanity. As noted above, the M'Naughton test of insanity requires either that the defendant was incapable of knowing or understanding the nature and quality of the act or of distinguishing right from wrong at the time of the commission of the offense. Statutory and case law does not specifically exclude any defect of the defendant as a bar to use of the insanity defense.

"Should the Legislature restrict the type of mental disease which may be relied upon by mental health experts to arrive at a conclusion regarding legal insanity?

". . . . . ."

Ultimately, the interpretation of a statute is a legal question for us to decide (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011), and we find defendant's construction to be untenable for several reasons.

First, while the legislative materials stressed by defendant might, in isolation, favor his thesis, his thesis is incompatible with the legislative materials stressed in *Robinson*. He makes no legal argument that the materials in *Robinson* were improperly considered, yet asks us to reject them out of hand, for no good reason. The two sets of materials are not incompatible. The *Robinson* materials simply add discussion on a point not specifically covered in the others. The constructions in *Robinson* and *Cabonce* properly honor both sets of materials, considered together, as we should. (*People v. Snook* (1997) 16 Cal.4th 1210, 1219.)

Second, defendant's construction essentially returns the law to its state under *Kelly*, *supra*, 10 Cal.3d at page 576: "When long-continued intoxication results in insanity . . . , the mental disorder remains even after the effects of the drug or alcohol have worn off. The actor is 'legally insane,' and the traditional justifications for criminal punishment are inapplicable because of his inability to conform, intoxicated or not, to accepted social behavior. [Citation.] He is, of course, subject to commitment in a mental institution. . . . The proper rule of law was early established in *People v. Travers* [(1891) 88 Cal. [233,] 239-240: '[S]ettled insanity produced by a long-continued intoxication affects responsibility in the same way as insanity produced by any other cause. *But it must be "settled insanity," and not merely a temporary mental condition produced by recent use of intoxicating liquor.'* (Italics added.) Thus it is immaterial that voluntary intoxication may have caused the insanity, as long as the insanity was of a settled nature and qualifies under the M'Naughton test as a defense." The condition had to be settled, but **not** necessarily permanent (*ibid.*), and we will refer to this as the settled-condition rule.

Eight years after *Kelly*, changes by the Legislature in the area of mental conditions and voluntary intoxication abolished the traditional *diminished capacity* test and replaced it with what is now dubbed *diminished actuality*, limiting use of such evidence to

showing whether the defendant *actually* had the required mental state for a crime (*People v. Steele* (2002) 27 Cal.4th 1230, 1253; *People v. Leever* (1985) 173 Cal.App.3d 853, 867-868). But that change expressly disclaimed any change to the determination of sanity under section 1026 (§ 28, subd. (c)), leaving the California M'Naughton rule intact. (See also *People v. Skinner* (1985) 39 Cal.3d 765, 768-769, 771-775 [accepting 1982 voter initiative as restoring California M'Naughton test but rejecting, as draftsman's error, language that would render M'Naughton test's prongs conjunctive rather than disjunctive]; *People v. Leever, supra,* 173 Cal.App.3d at pp. 867-868.)

Defendant would have us hold that section 25.5, which *expressly does apply to sanity determinations*, nevertheless failed to alter the settled-condition rule of *Kelly*. This does violence to the legislative materials defendant himself cites, which state in part "Limitation of Definition of Insanity. As noted above, the M'Naughton test of insanity requires either that the defendant was incapable of knowing or understanding the nature and quality of the act or of distinguishing right from wrong at the time of the commission of the offense. *Statutory and case law does not specifically exclude any defect of the defendant as a bar to use of the insanity defense*. [¶] *Should the Legislature restrict the type of mental disease which may be relied upon by mental health experts to arrive at a conclusion regarding legal insanity?*" (Italics added.) (Assem. Com. on Pub. Safety, analysis of Sen. Bill 40X (1993-1994 Reg. Sess.) as amended May 10, 1994; fn. 7, *ante*.) Section 25.5 itself specifies drug addiction and abuse as one category to be excluded. Defendant's proposed limitation renders that specification surplusage, in that the only effect it would have is to state then-existing law under *Kelly*. Wherever possible, we must construe legislative materials in a way that reconciles them rather than rendering one surplusage. (*People v. Cruz* (1996) 13 Cal.4th 764, 782.)

Third, defendant's construction makes little sense if we back away from the legislative materials altogether and examine the starting point and most reliable indicator of intent, the words of the statute (*People v. Torres* (2001) 25 Cal.4th 680, 685). Section 25.5 states in part that one cannot base an insanity finding solely on "an addiction to, or abuse of, intoxicating substances." Defendant's argument for perpetuating the settled-

condition rule makes no sense at all if applied to an "addiction to" drugs, for addictions are *inherently settled* conditions. No ambiguity appears to warrant going beyond plain meaning (*People v. Torres*, *supra*, 25 Cal.4th at p. 685), or resolving this dispute in a defendant's favor. (*People v. Jones* (1988) 46 Cal.3d 585, 599.)

Fourth, while still examining the words themselves, we see the immediately following sentence: "This section shall apply only to persons who utilize this defense on or after the operative date of the section." (§ 25.5.) If this statute did not change the law regarding sanity proved solely by drugs or addiction, there would be no need for that language, for retroactive application would not be objectionable. (*In re E.J.* (2010) 47 Cal.4th 1258, 1273.)

Fifth, and in a related vein, we generally presume the Legislature is aware of appellate court decisions (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1155-1156), which means we may presume that the Legislature knew the settled law of *Kelly* when it added those provisions to the sanity law. Again, there would have been no reason to exclude categories of causes unless lawmakers intended to change the law. One express reason in the materials defendant cites, in fact, notes a need in that there is no existing exclusion of such categories in the case or statutory law (fn. 7, *ante*).[8]

Sixth, defendant complains, apparently on policy grounds, that abrogating the settled-condition rule for someone suffering a settled condition caused solely by long-term drug abuse is inimical because, contrary to one legislative rationale that defendants

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[8] Our Supreme Court has not directly weighed in on the question before us but has implicitly recognized, in dictum, that section 25.5 did effect a change in the law after *Kelly*. "Defendant cites no California cases, and we have found none, that directly decide whether unconsciousness based on the lingering effects of chronic drug ingestion can be a complete defense to homicide, or any crime. In *Kelly*, *supra*, 10 Cal.3d 565, we concluded that an *insanity* defense could be based on such a theory, but we appeared to distinguish the defense of unconsciousness. [Citation.] Subsequently, the Legislature made clear, for purposes of crimes thereafter committed, that the *insanity* defense may *not* be based upon 'an addiction to, or abuse of, intoxicating substances.' (§ 25.5, added by Stats. 1994, 1st Ex. Sess. 1993-1994, ch. 10, § 1, p. 8562.)" (*People v. Boyer* (2006) 38 Cal.4th 412, 469-470, fn. 41.)

in these excluded categories usually have a choice (see fn. 7, *ante*), a sufficiently drug-damaged user, he urges, might not. The simple answer, of course, is that a court generally does not concern itself with the wisdom of legislation. Defendant does not pose this argument as a constitutional or as-applied challenge, but even if he did, it would be hard to argue that denying him state hospital treatment was irrational when one of his own experts testified that his condition was untreatable and could not be cured.

For all of those reasons, we adhere to the construction in *Robinson* and *Cabonce*.

B. *Sentence Calculation*

The aggregate unstayed prison sentenced imposed was 13 years. The court utilized the principal/subordinate term scheme of section 1170.1, subdivision (a), which requires, subject to the double punishment limitations of section 654, that the court select a principal term consisting of the greatest term imposed for any offense plus any "specific enhancements" as further defined in section 1170.1. The principal term here consisted of nine years—a mitigated five-year term for the count 1 attempted murder (§§ 187, 664, subd. (a)), plus one and three years more for the use and GBI enhancements (§§ 12022, subd. (b)(1), 12022.7, subd. (a)). There is no challenge to that calculation or the court's section-654 stay of all punishment for the count 2 assault against the same victim, Ortiz.

The subordinate term is concededly in error. It should have consisted of a consecutive total of one-third the midterm for other offenses and specific enhancements. (§ 1170.1, subd. (a).) That should have been two years, consisting of one-third the three-year midterm for the count 3 assault against Murray (§ 245, subd. (a)(1)) plus one-third the associated three-year GBI enhancement (§ 12022.7, subd. (a)), but the court neglected to reduce to one-third the count 3 enhancement. This rendered the overall unstayed total 13 years rather than what it should have been, 11 years. We accordingly amend the sentence.

IV. DISPOSITION

The sentence is amended to reduce the count 3 GBI enhancement (§ 12022.7, subd. (a)) from three years to one, rendering the total unstayed sentence 11 years. The judgment is affirmed as so amended. The superior court shall direct that an amended

abstract of judgment (§ 1213.5) be prepared and forwarded to the proper commitment authority. The related petition for writ of habeas corpus (A129364), having been separately considered, is hereby denied.

_____
Haerle, Acting P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.